IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1028 44

ALLEN WAINER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF AND ARGUMENT FOR APPELLANT, ALLEN WAINER.

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Cases Cited.

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BRIEF AND ARGUMENT FOR APPELLANT.

MAY IT PLEASE THE COURT:

On December 19th, 1939, a conspiracy indictment in seven counts was returned against the Appellant and thirty others in the District Court for the Eastern District of Michigan (R. 1-26). The allegations of each count are alike as to parties, times and places of entry into and duration of the conspiracy. Each count charges that the conspiracy therein alleged was to commit a particular offense against the internal revenue laws, viz: Count 1 (R. 1-7), unlawfully to carry on the business of wholesale and retail liquor dealers without having the special occupational tax stamp as required by law; Count 2 (R. 7-12), unlawfully to possess distilled spirits, the immediate containers thereof not having affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payments of all internal revenue taxes imposed on such spirits; Count 3 (R. 12-15), unlawfully to transport large quantities of distilled spirits, the immediate containers thereof not

having affixed thereto the required stamps; Count 4 (R. 15-18), unlawfully to carry on the business of distillers without having given bond as required by law and with intent to defraud the Government of the tax on the spirits which would be distilled; Count 5 (R. 18-21), unlawfully to remove, deposit and conceal distilled spirits in respect whereof a tax was imposed by law with intent to defraud the United States of such tax; Count 6 (R. 21-24), unlawfully to possess, keep in custody, control and set up unregistered stills and distilling apparatus; and Count 7 (R. 24-26), unlawfully to make and ferment mash fit for the production of distilled spirits on premises not duly authorized and designated according to law as a distillery.

Appellant, together with some other defendants, plead not guilty and stood trial. Some defendants plead guilty and testified on behalf of the Government. At the trial the Government introduced the testimony of Henry S. Scampo (R. 67), a co-defendant who had pleaded guilty, that he contacted the Petitioner at either Wyandotte or Detroit, Michigan, in the spring of 1936; that Wainer offered to sell him and his partner (R. 68), Clarence Dracka, alcohol. It was agreed that the shipments were to be boxed with so many cans to a box and sent over the Motor Freight Lines; that they, he and Dracka, received shipments for a period of two or three months in the spring of 1936 (R. 69); at the end of that time he had a telephone conversation with Wainer in which he said they wanted some more alcohol. Wainer was not able to get it and he, Wainer, said he was quitting the business; he said he was all through.

Clarence Dracka, another co-defendant who had pleaded guilty, testified (R. 92) that he and Scampo received alcohol from Wainer in Chicago for a short period of six or eight weeks; that during this period he did not talk to Wainer, but that Wainer went to Wyandotte and talked to Scampo and him, at which time Wainer said he was

through with the alcohol business; that he was not making any money; that he wanted to get out of it, and therefore could send no more.

Scampo further testified that he went to Chicago in the fall of 1936 and asked the Appellant here if he, the Appellant, could get him some alcohol, and the Appellant said that he was entirely out of business and could not do him any good (R. 71). He then asked the Appellant if he could help him get a warehouse and the Appellant said he would call a man at the warehouse and see if he could get him a room. The Appellant made a statement (R. 384) and testified in his own behalf (R. 558). He testified (R. 559) that he sold alcohol to Scampo and Dracka on about three or four occasions in the months of May and June, 1936; that he saw them after that in Detroit and told them that he did not want to ship them any longer; that he was through with the business and had quit; that he had quit about the end of June, 1936, and that after that time he did not ship any alcohol to them or anyone else in Detroit or to anyone at any time or any place since the month of June, 1926; that he pleaded guilty to an indictment returned in the Northern District of Illinois at Chicago, Illinois, about April 20th or 21st, 1937; that in that indictment he was charged with conspiring to commit an offense against the United States by violating the Internal Revenue Laws in regard to the sale of alcohol and was sentenced to a term of imprisonment of two years and six months; taht he was taken in custody at that time and entered the Federal Penitentiary at Atlanta, Georgia, in June, 1937; that he was admitted to parole (R. 559), served his parole, and was in the real estate business in Chicago.

There is no evidence of any kind or character in the Record that either shows or tends to show that the Appellant was in any way connected with the conspiracy charged or that he did anything in furtherance of it for more than three years prior to the return of the indictment herein.

At the close of the Government's case (R. 462) a motion was made to require the Government to elect upon which counts of the indictment they intended to proceed and have the case submitted to the jury. The motion was overruled. A further motion was made for a directed verdict (R. 464) on the ground that the prosecution was barred by the Statute of Limitations. This motion was refused. A further motion was made on behalf of the Appellant that there be a directed verdict in his behalf (R. 475-476-477-478-479-480-481) upon the grounds of former jeopardy. This motion was also refused. Exceptions were preserved in all cases. Upon the finding of guilty herein the Court sentenced this Appellant to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a penitentiary for and during the term and period of eight years and to pay a fine in the sum of Two Thousand Dollars ($2,000.00), (R. 45).

Specifications of Error.

1. The Circuit Court of Appeals erred in sustaining the imposing of one general sentence of eight years imprisonment and a fine of Two Thousand Dollars ($2,000.00) herein.

2. The Circuit Court of Appeals erred in holding that the Statute of Limitations raises no bar to the prosecution of the instant case and that the limitation period is six years and not three years, and that the trial court was under no duty to submit this question to the jury.

3. The Circuit Court of Appeals erred in sustaining the refusal to instruct the jury as to the effect of the evidence indicating abandonment of the conspiracy for more than three years prior to the return of the indictment.

4. The Circuit Court of Appeals erred in failing to sustain this Appellant's plea of former jeopardy.

BRIEF OF AUTHORITIES.

The Circuit Court of Appeals erred in sustaining the imposing of one general sentence of eight years imprisonment and a fine of Two Thousand Dollars ($2,000.00) in this case.

Frohwerk v. *United States*, 249 U. S. 204-210.
United States v. *Manton*, 107 F. (2d) 834-838.
Powe v. *United States*, 11 F. (2d) 598.
Miller v. *United States*, 4 F. (2d) 228-230.
Murphy v. *United States*, 285 F. 801.
Anderson v. *United States*, 101 F. (2d) 325-333.
Ex Parte Rose, 53 F. Supp. 941.

The Circuit Court of Appeals erred in holding that the Statute of Limitations raises no bar to the prosecution of the instant case and that the limitation period is six years and not three years, and that the trial court was under no duty to submit this question to the jury.

United States v. *Scharton*, 285 U. S. 518.
United States v. *McElvain*, 272 U. S. 633.

The Circuit Court of Appeals erred in sustaining the refusal to instruct the jury as to the effect of the evidence indicating abandonment of the conspiracy for more than three years prior to the return of the indictment.

United States v. *Scharton*, 285 U. S. 518.
United States v. *McElvain*, 272 U. S. 633.

The Circuit Court of Appeals erred in failing to sustain the Appellant's plea of former jeopardy.

Short v. *United States*, 91 F. (2d) 614.

ARGUMENT

We most respectfully contend that it was error to impose one general sentence of eight years imprisonment and a fine of Two Thousand Dollars ($2,000.00) herein because under no view of the evidence was there presented more than one conspiracy. That was the theory of the Government when the case was tried and the theory upon which the jury was charged, that the offense herein constituted one conspiracy. The District Attorney who tried the case stated (R. 470):

> "'The conspiracy is one as to time and place and as to all the parties named in the indictment; that is our theory.'".

The trial court during the course of the trial apparently adopted that theory, as is shown on the Record, page 275:

> "Question: The indictment charges seven conspiracies.
>
> The Court: Well, let's settle that. That is an extravagant statement. You claim there are seven conspiracies?
>
> Mr. Frederick (defense counsel): Set up in seven separate counts. Each count sets up a conspiracy, yes, your Honor, seven counts. Each count sets up a conspiracy.
>
> The Court: Is that right?
>
> Mr. Hopping (Assistant District Attorney): I would not say that that was, your Honor. It is one count—
>
> The Court: Well, never mind.
>
> Mr. Hopping: One conspiracy indictment and seven counts charging seven illegal objects of the conspiracy."

In charging the jury the trial judge (R. 626-627) charged:

> "The Government claims in this case that this was a continuing conspiracy."

We respectfully insist that taking all of the evidence of the Government in its favorable light only one conspiracy was shown and that under no theory of the law could a sentence of more than two years imprisonment and a fine have been imposed. As for the evidence that it was always the Government's contention that this was a single conspiracy a request to charge on the question as to whether there were several different conspiracies was refused (R. 40); (this request was joined in by Appellant's counsel, R. 644); and the court charged this was to be treated as one conspiracy continuous in character (R. 626).

There can be no question, of course, but that a conspiracy may have a multiplicity of purposes. However, Mr. Justice Holmes stated in *Frohwerk* v. *United States*, 249 U. S. 204-210:

> "The conspiracy is the crime and that is one however diverse its objects."

That theory of law has been adopted in the Second, Fifth, Seventh and Eighth Circuits and we respectfully submit that it should be adopted as the law of the land.

Mr. Justice Sutherland, in the case of *United States* v. *Manton*, 107 F. (2d) 834-838, in his opinion in that case stated:

> "The conspiracy constitutes the offense irrespective of the number or variety of objects which the conspiracy seeks to attain or whether any of the ultimate objects be attained or not."

A similar conclusion was reached in *Powe* v. *United States*, Fifth Circuit, 41 F. (2d) 598. In that case there was an overlapping of periods, whereas in this case the time of the alleged conspiracies from the beginning to the termination were identical. In the Powe case the court said:

> "The first count of the indictment in this case charges a conspiracy to commit a single offense which is included within the continuing conspiracy charged in the second count. According to the testimony it

was one general continuing conspiracy to commit a number of offenses and no separate conspiracy to commit a single offense. The Government cannot split up one conspiracy and make several conspiracies out of it."

In the case of *Miller* v. *United States*, 4 F. (2d) 228-230, the Seventh Circuit Court of Appeals, in discussing an almost identical situation with the one before the court said:

> "It is contended that the two counts are for the same offense and that in any event the evidence does not warrant separate cumulative penalties under these counts. That there was a conspiracy between Miller and others to steal or aid in stealing and removing from the warehouse this large quantity of alcohol, there is under the record, no shadow of doubt. Stealing the alcohol naturally involved the seizing of it where it was and transporting it elsewhere. While such acts might be prosecuted and punished separately if under different statutes defining and penalizing the several acts, a single conspiracy if covering the entire transaction may not be split up into a plurality of offenses."

and cited *Murphy* v. *United States*, Seventh Circuit, 285 F. 801.

In the Murphy case the court held that in the case of a conspiracy to rob a mail truck there could not reasonably be separate convictions for conspiracy to hold up and rob the truck and for conspiracy to have and conceal stolen property, *even though two separate substantive offenses were created by those statutes which were severally alleged as the objects of the two conspiracies.* The court reached its conclusions in that case on consideration of the petition for rehearing and modified the sentence inflicted on Murphy accordingly. Judge Evans said, (p. 817):

> "It may be admitted that separate conspiracies may be thus formed, to effectuate which different plans involving perhaps different conspiracies are formu-

lated. We need not decide any such imaginary case, but content ourselves with a decision applicable to the facts in this case. The evidence leaves no room for legitimate discussion. It conclusively establishes but one conspiracy. There was no separate conspiracy to have and to conceal the stolen property, and no evidence tending to show such separate combination.

"The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine this issue. And it is needless to add that one accused of crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution. The sentence on this count therefore cannot be sustained."

Again, in the case of *United States* v. *Anderson*, 101 F. (2d) 325-333, the Seventh Circuit Court of Appeals again had before it the question here considered. While the court said it was alright for the Government to plead separate offenses in conspiracy counts "as a precautionary matter, but we cannot believe that Congress intended to permit the accumulation of sentences upon diverse objects of a conspiracy where there was but one conspiracy and the evidence supporting each was precisely the same."

In the Eighth Circuit, in the case *Ex parte Rose*, 33 Fed. Supp. 941, which came before the court on a petition for a writ of habeas corpus, the petition setting out that the petitioner was sentenced for a period of two years on each of two counts of an indictment, to run consecutively, whereas each count covered and was for an identical offense, and that he had now served more than two years of his sentence. Each count charged a conspiracy; count one to unlawfully remove, deposit and conceal and be concerned in the removing, depositing and concealing of goods and commodities for and in respect whereof any tax is imposed, with intent to defraud the United States of the

tax imposed thereon, and the second count, that he conspired to possess certain distilled spirits, to-wit, large quantities of alcohol, the immediate containers of which did not have affixed thereto any stamp or stamps, etc. The writ was allowed and the petitioner discharged. In the instant case every count of the indictment is identical as to time, place and persons, the only difference in the counts being that they charge a different object of conspiracy.

2. The Statute of Limitations.

We desire to call to the court's attention that in each count of this indictment the conspiracy is charged to commit an offense against the United States and not to defraud the United States.

The period of limitation for prosecution in the instant case is fixed by Title 18, Sec. 3748, as amended on June 6, 1932. By the language of this enactment the general limitation for prosecutions under the Internal Revenue Laws is fixed at three years, subject to several exceptions. These exceptions are: (1) for offenses involving the defrauding or attempt to defraud the United States by conspiracy or not (2) for offenses of wilfully attempting any manner to evade or defeat a tax, (3) for acts relating to income tax returns, and finally (4) for conspiracy, where the object thereof is wilfully to evade or defeat any tax or the payment thereof. As to offenses falling within the exceptions, the period of limitation is fixed at six years.

The last proviso or excepting clause was apparently added to conform to the decision of the United States Supreme Court in the case of *United States* v. *Scharton*, 285 U. S. 518, which held that such excepting provisions were to be narrowly construed.

The court in that case refused to read into the language of the statute an attempt to defeat or evade the payment

of a tax as an offense included within the language of defrauding or attempting to defraud the United States.

This, and prior decisions of the same court, interpreting like sections, clearly demonstrate that in determining the period of limitation to be applied to prosecutions for conspiracy to violate various sections of the Internal Revenue laws, reference must be had to the substantive offense. Unless the substantive offense contains as an ingredient, one of the exceptions provided for, the general period of limitation applies.

Thus did the court so declare itself in this language:

> "As said in the Noveck case, statutes will not be read as creating crimes or classes of crimes unless clearly so intended, and obviously we are here concerned with one meant only to fix periods of limitation. Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. *McElvain* v. *U. S.*, 272 U. S. 633. And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the Statutes Creating Offenses. *U. S.* v. *Hirsch*, 100 U. S. 33; *U. S.* v. *Rabinowich*, 238 U. S. 78; *U. S.* v. *Noveck*, 271 U. S. 201. The purpose of the proviso is to apply the six year period to cases in which defrauding or an attempt to defraud the U. S. is an ingredient under the statute defining the offense." *U. S.* v. *Noveck* (*supra*).

With equal vehemence may we urge, in reading the added section applicable to prosecutions for conspiracy to defeat or evade the tax that it applies to cases in which this "is an ingredient under the statute defining the offense."

In the light of the law referred to, it therefore becomes patent that the period of limitation is three years.

Upon the trial, a claim of the running of the statute of limitations was made as to the Appellant. This was done

upon motion made at the conclusion of the Government's case and again in the form of requests to charge 8, 9 and 10 (R. 40). All such motions were denied by the trial court. Inasmuch as a general verdict of guilt was rendered and a general sentence imposed, it is obvious that such error upon the part of the court was prejudicial to their rights. The record clearly discloses that the Appellant herein made his last shipment of alcohol on or about July 24, 1936 (R. 88, 89, 224) and refused to have anything more to do with the conspiracy here charged.

In the case of *United States* v. *McElvain*, 272 U. S. 633, this Court held the proviso to U. S. Revised Statutes 1044 fixing the limitation period for prosecution of offenses against the United States does not extend to offenses not covered by the section and therefore does not apply to conspiracies to defraud the United States in respect to its Internal Revenue prosecuted under Section 37 of the Criminal Code.

3. Plea of former jeopardy should have been sustained.

On the trial of this case this Appellant filed a plea of former jeopardy (R. 475) and in that plea set out that he was indicted at the November Term, 1936, in the United States District Court at Chicago, Illinois, charged among other things with the conspiracy to violate the same laws at Chicago and elsewhere that this indictment charged him with, and that he entered a plea of guilty to that indictment and was sentenced to serve a term of two years and six months in the United States Penitentiary, which he served. We respectfully call the Court's attention to the indictment in the instant case and in every count of the present indictment it is charged that he conspired, among other places, at Chicago, Illinois, during the same time that he was charged by the indictment returned by the indictment returned by the Grand Jury at Chicago. The Court overruled that motion. We believe that he should have had the

benefit of it and that the laws laid down in the Fourth Circuit Court of Appeals in *Short, et al.* v. *United States*, 91 F. (2d) 614, should apply. In that case the Court said:

> "Blanket charges of 'continuing' conspiracy with named defendants and with 'other persons to the grand jurors unknown' fulfill a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties. If general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first."

Conclusion.

For all the reasons stated above, it is urged that the judgment of conviction herein should be reversed.

Respectfully submitted,

John E. Dougherty,

Counsel for Appellant, Allen Wainer.

APPENDIX.

1. Sec. 88, Title 18, U. S. C. A.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both.

2. Chapter 36, Sec. 3748, U. S. C. A., Periods of limitation.

(a) Criminal prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of wilfully attempting in any manner to evade or defeat any tax or the payment thereof, and

(3) for the offense of wilfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

For offenses arising under Section 37 of the Criminal

Code, March 4, 1909, 35 Stat. 1096 (U. S. C., Title 18, Sec. 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.